DOCKET FILE COPY ORIGINAL


PATTON, BOGGS & BLOW

2550 M STREET, N.W.

WASHINGTON, D.C. 20037

(202) 457-6000

TRT TELEX: 197780

TELECOPIER: 457-6315

WRITER'S DIRECT DIAL

(202) 457-6000


May 12, 1993

Federal Communications Commission
Office of the Secretary
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RECEIVED
MAY 12 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 92-264

Dear Sir:

Enclosed for filing please find the original and nine copies of the reply comments of Discovery Communications, Inc. in the above-captioned docket number.

Sincerely,

Jerianne Timmerman

Jerianne Timmerman

0/9

DOCKET FILE COPY ORIGINAL

RECEIVED

MAY 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Sections 11 | ) | |
| and 13 of the Cable Television | ) | |
| Consumer Protection and Competition | ) | MM Docket No. 92-264 |
| Act of 1992 | ) | |
| | ) | |
| Horizontal and Vertical Ownership | ) | |
| Limits, Cross-Ownership Limitations | ) | |
| and Anti-Trafficking Provisions | ) | |

REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

## Table of Contents

RECEIVED

MAY 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-264 |
| | ) | |
| Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions | ) | |

## REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

Discovery Communications, Inc. ("Discovery") hereby replies to the comments filed with respect to the Commission's Notice of Proposed Rulemaking to implement sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). These reply comments emphasize that overly restrictive subscriber and channel limitations are unnecessary in light of the rules recently adopted by the Commission under section 19 of the Cable Act to prevent unfair or discriminatory practices in the sale of cable programming.

### I. INTRODUCTION AND SUMMARY

Sections 11 and 19 of the Cable Act both address the same perceived problem: potential foreclosure of programming to distributors who seek to compete with established cable operators. Because the Commission already has adopted stringent rules which preclude cable programmers who are affiliated with cable operators (and all satellite broadcasters) from favoring such operators, there is no need to adopt restrictive subscriber and channel limitations -- particularly when such inflexible limits could pose a significant threat to the diversity of cable programming. Programmers who deal fairly with all distributors and give no preference to their cable-operator owners will be hurt just as much as programmers who give preference to their owners. Indeed, if restrictive channel limitations were adopted, The Learning Channel, which does not give any preferences to its cable-operator owners, could suffer a reduction provisions,[1] seek to limit the power of cable operators and to favor competitors of cable operators.

The texts of sections 11 and 19 illustrate that these provisions were intended to deal with the same problem -- potential foreclosure of programming to overbuilders, alternative technology distributors and other competitors of cable operators. Significantly, the Notices of Proposed Rule Making for section 19 (¶¶ 2-4) and for section 11 (¶ 5) cite the same concerns about vertical integration and horizontal concentration in the cable market creating barriers to entry.[2]

Section 11 addresses the perceived problem of cable operator market power by mandating that the Commission set "reasonable limits" both on the number of subscribers a cable operator can reach through commonly owned cable systems and on the number of channels on a cable system that can be occupied by a programmer in which a cable operator has an attributable interest. Channel limits are intended to make more programming available to overbuilders and alternative technology distributors. At the same time, however, such limits could harm (i)

---

1/ For example, section 12 directs the Commission to implement regulations regarding the terms and conditions under which unaffiliated distributors may obtain access to vertically integrated program services; section 9 requires the Commission to promulgate new rules to make the use of "leased access" channels a more desirable alternative for programmers; the must carry rules of section 4 directly address the ability of unaffiliated program providers to reach consumers.

2/ See also Notice of Proposed Rule Making to Implement sections 11 and 13 of Cable Act, ¶¶ 52 and 60 (Commission specifically asked commenters to consider provisions of sections 12 and 19 of Cable Act when commenting on channel limits and restrictions on cable operator participation in program production under section 11).

programmers by cutting off access to viewers and (ii) consumers by depriving them of desired programming.[3/] Subscriber limits are also intended to benefit alternative technology distributors and overbuilders by restricting the freedom of affiliated cable operators to expand, thereby creating greater opportunity for overbuilders and alternative technology distributors. At the same time, however, subscriber limits also could harm (i) programmers by restricting their ability to reach the greatest number of viewers and (ii) consumers by depriving them of their ability to obtain a desired cable service.

Removing any doubt about the underlying purpose of the section 11 limits, section 11(c) explains that the Commission should promulgate such limits in way that ensures that cable operators affiliated with programmers do not (i) favor such programmers in determining carriage on their cable systems, or (ii) unreasonably restrict the flow of the programming of their affiliated programmers to other distributors. Section 11(c) additionally directs the Commission to ensure that no cable operator can unfairly impede, because of its size, the flow of programming from the programmer to the consumer.

---

3/ The Commission has stated that the statutory language is unclear whether such channel limits were meant to apply only to video programmers affiliated with the particular cable operator or whether such limits were intended to apply to any cable affiliated video programmer. Notice of Proposed Rule Making for sections 11 and 13 at ¶ 49. If the rules adopted follow the latter interpretation, a vertically integrated programmer may have great difficulty in obtaining carriage with <u>any</u> cable operator, which obviously could seriously impair its ability to remain in business.

Section 19 addresses the problem of cable operator power over the availability of programming in a more flexible way, less likely to harm programmers and consumers. Section 19 forbids cable operators with ownership interests in programmers from unduly or improperly influencing the decision of such affiliated programmers to sell, or the prices, terms and conditions of the sale of, programming to any unaffiliated distributor. In particular, section 19(b) broadly prohibits cable operators from engaging in unfair methods of competition or practices which will hinder or prevent any multichannel video programming distributor from providing programming to subscribers or consumers. And section 19(c) attempts to prevent the foreclosure of programming to the competitors of cable operators by (i) prohibiting most exclusive arrangements between vertically integrated programmers and operators and (ii) forbidding vertically integrated programmers from discriminating against alternative technology distributors in the sale of programming.

Thus, both section 11 and section 19 directly address the problem of potential foreclosure of entrants into the cable market by limiting the power of cable operators and by ensuring that all competitors of cable operators have access to programming.

## III. THE COMMISSION'S SECTION 19 RULES ALREADY ADDRESS THE UNDERLYING PROBLEM IN A COMPREHENSIVE FASHION.

The Commission's newly-adopted section 19 rules comprehensively address the potential foreclosure concerns associated with vertical integration and horizontal concentration by imposing signficant restraints on all cable operators and on vertically integrated cable programmers. Initially, the regulations define vertical integration based on a strict attribution standard. With respect to the prohibition against price discrimination in distributing cable programming, the justifications for price differentials are limited to those explicitly listed in the statute, and the vertically integrated programmer bears the burden in all cases to establish that price differentials are adequately explained by the statutory factors.

In addition, the Commission refused to adopt "safe harbors" or benchmarks or other mechanisms for screening complaints against programmers; thus, <u>any</u> differential in price paid by one distributor (such as an alternative technology distributor) as compared to its competitor (such as a cable operator) may form the basis for a complaint. Moreover, the regulations encourage complainants to bring complaints against vertically integrated operators and programmers that allegedly engage in discrimination or exert undue influence under section 19(c) by placing minimal evidentiary burdens on complainants.4/ With regard to exclusive contracts, exclusive arrangements between vertically integrated programmers and operators in areas not served by a cable operator are *per se* illegal. Exclusive contracts in areas served by cable may not be enforced unless the Commission <u>first</u> determines that the contract serves the public interest. The stringent nature of the Commission's section 19 rules will prevent abuses by vertically integrated programmers and all cable operators and will ensure that potential competitors of established

---

4/ For example, the complainant need <u>not</u> make a threshold showing of harm or show that vertical integration exists in the specific market at issue.

cable operators are not foreclosed from obtaining programming.

There is, thus, no need to adopt restrictive and inflexible addresses this same foreclosure concern in a far less flexible manner -- by authorizing arbitrary limits on the ability of cable operators to carry programmers in which they have an ownership interest. Because section 19 affords the Commission greater discretion, the Commission should rely primarily on section 19 to prevent abuses of vertical and horizontal concentration. Significantly, the Commission refused to adopt safe harbors under section 19 in part because of their inflexibility.

The danger of restrictive section 11 limits is that such limits do not distinguish between cable operators and programmers who have conducted business in a fair, nondiscriminatory manner and those who have not. In particular, such limitations pose a serious risk to The Learning Channel, which has never favored its cable operator-owners. The Learning Channel, because it is a relatively new channel,[5/] experienced difficulty obtaining carriage even prior to regulation, and would likely be one of the channels dropped if strict channel limitations are imposed. Surely the public interest in diverse programming will not be served if the Commission's regulations cause the demise of one of the most innovative and constructive cable channels. In sum, the Commission should impose restrictive channel or subscriber limits only if its section 19 rules prove inadequate.

---

5/ Discovery acquired The Learning Channel in 1991 and substantially upgraded its programming, effectively creating a new channel.

## V. CONCLUSION

The Commission should impose the least restrictive limits on subscribers and channels possible, given that such limits not only pose threats to both programmers and consumers but also are unnecessary, as the stringent section 19 regulations will effectively address any abuses resulting from vertical integration and horizontal concentration in the cable market. Ultimately, the consumer would be the loser if overly restrictive subscriber and channel limitations are imposed.

Dated: May 12, 1993

Respectfully submitted,

Jerianne Timmerman


Garret G. Rasmussen
Jerianne Timmerman
Patton, Boggs & Blow
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000

Of Counsel:

Judith A. McHale
Senior Vice President and General Counsel
Discovery Communications, Inc.

Barbara S. Wellbery
Vice President and Deputy General Counsel
Discovery Communications, Inc.
(301) 986-0444 Ext. 5219